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In the Supreme Court of the United States

OCTOBER TERM, 1976

ROBERT L. GILMORE, PETITIONER

v.

WEYERHAEUSER COMPANY and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-21) is reported at 528 F. 2d 957. The opinion of the Benefits Review Board (Pet. App. 22-29) is reported at 1 BRBS 180.[1] The administrative law judge's decision (Pet. App. 30-43) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1975. A petition for rehearing and suggestion of rehearing *en banc* were denied on February 9, 1976 (Pet. App. 1-2). The petition for a writ

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[1]The Benefits Review Board Service, published by Matthew Bender & Co., is the reporter of the Board's decisions.

of certiorari was filed on May 6, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act eliminated the previously existing coverage of workers whose employment duties are performed upon navigable waters but do not pertain directly to traditional navigation.

STATUTES INVOLVED

1. Prior to its amendment in 1972, the Longshoremen's and Harbor Workers' Compensation Act provided in relevant part:

Section 2(3), 44 Stat. 1425, 33 U.S.C. 902(3):

> The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 3(a), 44 Stat. 1426, 33 U.S.C. 903(a):

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

2. As amended by the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251 *et seq.*, the Act now provides in relevant part:

Section 2(3), 86 Stat. 1251, 33 U.S.C. (Supp. IV) 902(3):

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 3(a), 86 Stat. 1251, 33 U.S.C. (Supp. IV) 903(a):

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

STATEMENT

On January 30, 1973, petitioner was injured while employed as a "pondman" by respondent Weyerhaeuser Company. Petitioner sorted debarked logs afloat in Coos Bay, Oregon, directing the logs to conveyor belts which fed them to his employer's mill for further processing. He worked on movable floating walkways,[2] and sometimes on the logs themselves, within Weyerhaeuser's "pond," a part of Coos Bay enclosed by floating log booms. See Pet. App. 23-24.

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[2]Petitioner fell from or through such a walkway into the water. He was disabled for 21 days as a result of this fall. Pet. App. 32.

Weyerhaeuser and its compensation insurance carrier resisted petitioner's claim for compensation, arguing that the injury is not within the coverage of the Longshoremen's and Harbor Workers' Compensation Act.[3] An administrative law judge rejected petitioner's claim. He concluded that the injury would not have been covered by the Act prior to its amendment in 1972, and that the amendments had not extended the Act's coverage to workers whose employment duties bore no direct relationship to traditional maritime activity (Pet. App. 30-43).

The Benefits Review Board disagreed. It stated that the administrative law judge's assumption that petitioner's injury would not have been covered by the unamended Act was clearly erroneous (Pet. App. 25-26). The Board held that the amendments had not withdrawn the existing coverage of such injuries (*id.* at 26-28).

The court of appeals agreed with the Board's construction of the unamended Act but rejected its interpretation of the amendments. It held that by providing that an "employee" is "any person engaged in maritime employment" (Section 2(3), 33 U.S.C. (Supp. IV) 902(3)) Congress had repudiated decisions of this Court holding that the Act applies to workers injured during employment on navigable waters. The court of appeals therefore decided to "relegate [the Supreme Court's] decisions to limbo" (Pet. App. 11). Otherwise, it thought, "the clear and unambiguous congressional language of 'maritime employment' is nullified and rendered to read 'any employment.' " *Id.* at 16-17. The court held that petitioner's injury is not covered by the Act because his duties, although performed on navigable water, did not

[3]They paid petitioner the lesser compensation provided by an Oregon statute.

relate to "traditional maritime activity involving navigation and commerce on navigable waters" (*id.* at 17).

DISCUSSION

1. Petitioner's injury occurred on the navigable waters of the United States, and therefore he would have been covered by the Act if he had been injured prior to the Act's amendment in 1972. *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 117, 120, 124, 126-127. The Benefits Review Board so stated (Pet. App. 25-27), and the court of appeals did not disagree. But the court of appeals held that petitioner was not covered by the Act following its amendment; his employment was not "maritime" within the meaning of amended Section 2(3), the court held, because it had no "realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters' " (Pet. App. 17).

This standard is indistinguishable from the standard rejected in *Calbeck*, and it will produce the same enervating uncertainty that *Calbeck* laid to rest. Rather than "eliminat[ing] the gray areas of jurisdiction under the former statute and plac[ing] a clear line of demarcation" (Pet. App. 12) the amendments, as construed by the court of appeals, would recreate the "twilight zone" and the "maritime-but-local" distinctions that bred 35 years of unhappy litigation prior to *Calbeck*.

Nothing in the legislative history indicates that Congress sought to overturn *Calbeck* and resurrect, as a statutory matter, the constitutional subtleties of *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, *Western Fuel Co.* v. *Garcia*, 257 U.S. 233, and their progeny. Quite the contrary, Congress desired to bring certainty to the resolution of claims for compensation. The Benefits

Review Board was faithful to the legislative plan, and the court of appeals is in error.

Were the court of appeals' rule established, it would be clear without the need for further litigation that workers like petitioner, whose employment on the water involved the sorting and movement of sawlogs in a single location, would be outside of the Act's protection. Such employees are engaged in "maritime but local" employment under the pre-*Calbeck* law. *Sultan Railway & Timber Co.* v. *Department of Labor & Industries*, 277 U.S. 135. But the court of appeals' rule would require a similar "maritime but local" inquiry to be made each time a new case was presented. There are thousands of different occupations on the water, and the "maritime but local" line is more nice than obvious. It was used in the interval between *Western Fuel* and *Calbeck* only because the Court had thought that constitutional and statutory interplay left no alternative. There is no reason to resurrect the doctrine as a *preferred* method of statutory construction.

2. The court of appeals concluded that this standard had been injected into the Act by the amendment to Section 2(3), which now defines an "employee" as one who is engaged in "maritime employment." But there is no support in the Act for the court's narrow construction of "maritime employment." Indeed, the opposite proposition is implicit in the many cases of this Court denominating certain employment, much like that of petitioner's, as "*maritime* but local." See, *e.g.*, *Sultan Railway & Timber Co.* v. *Department of Labor & Industries*, *supra*, 277 U.S. at 137. Cf. *Calbeck*, *supra*, 370 U.S. at 133 (Stewart, J., dissenting). Congress presumably understood this accepted definition of "maritime" employment when it included that time-tested word in the amendments. The foremost scholars

of the subject have agreed. Although they acknowledge that there may be uncertainty concerning the meaning of "maritime employment" as applied to accidents on land, Gilmore and Black find no similar uncertainty when the accident takes place on navigable waters. See Gilmore and Black, *The Law of Admiralty* 429-430 (2d ed. 1975): "[A]ny worker injured on navigable waters will continue to be covered (as he has been in the past) without any inquiry into what he was doing (or supposed to be doing) at the time of his injury." See also 1A *Benedict on Admiralty* §17 (7th ed. 1973); Watson, *Broadened Coverage under the LHWCA*, 33 La. L. Rev. 683, 694 (1973).[4]

Whatever ambiguity there may be in the term "maritime employment" as applied to injuries on the navigable waters is resolved by the legislative history of the amendments. The Committee Reports indicate that the new language was intended to affect only the land-side coverage of the Act. The Senate Committee, which drafted the disputed language, explained that it—

> specifically includes any longshoreman or other person engaged in longshoring operations, and any harborworker, including a ship repairman, shipbuilder and shipbreaker. *It does not exclude other employees traditionally covered* * * * .

S. Rep. No. 92-1125, 92d Cong., 2d Sess. 16 (1972); emphasis added. The Committee was fully aware that all

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[4] *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, is relied on by both the court of appeals (Pet. App. 17-18) and respondent Weyerhaeuser (Br. in Opp. 5, 8-10) for the proposition that maritime location is insufficient. *Executive Jet* dealt, however, only with the problem of invoking the law of admiralty in the absence of a statute, a problem quite distinct from that presented here.

employees whose work is performed on the water had traditionally been covered by the Act.[5]

We submit that the amendments make it clear that the Act covers employment that is "maritime" either by virtue of its performance on navigable waters or by virtue of its relation to commercial shipping. The court of appeals had read the first sense of "maritime employment" out of the Act.

3. The instant decision is the first to interpret the effect of the amendments upon the Act's coverage of injuries on navigable waters. Because there is not yet a conflict among the circuits, we did not file a petition for a writ of certiorari. The new shoreside coverage of the Act has produced a great deal of litigation, however, and there is already a conflict among the circuits concerning the meaning of "maritime employment" as applied to injuries on land.[6] The Department of Labor informs us that the decision in the instant case, by

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[5] *Calbeck* had been reprinted in its entirety in Hearings on S. 2318, S. 525, and S. 1547, before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. 560-573 (1972). The witness who submitted it drew to the Committee's attention the fact that, under *Calbeck*, "all injuries to employees on navigable waters" were covered without regard to "whether their particular cases fell within or without state acts under the 'local concern' doctrine" (*id.* at 559).

[6] Compare *I.T.O. Corp.* v. *Benefits Review Board*, 529 F. 2d 1080 (C.A. 4) (rehearing *en banc* pending) (the Act covers only persons injured while loading or unloading ships), with *Pittston Stevedoring Corp.* v. *Dellaventura*, C.A. 2, No. 76-4042, decided July 1, 1976 (Friendly, J.) (the Act covers all persons engaged in stuffing and stripping cargo containers, and among persons performing more remote cargo-handling the Act covers at least those who also spend a significant part of their employment in such loading and unloading); *Stockman* v. *John T. Clark & Son*, C.A. 1, No. 75-1360, decided July 27, 1976 (same); and *Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs*, C.A. 3, No. 75-2039, decided August 5, 1976 (the Act covers all persons engaged in the handling of water-borne cargo, from delivery to the terminal by the shipper through loading aboard ship, and from discharge through delivery to the land carrier). Other cases involving similar issues have been argued in the Fifth Circuit. Many more such cases are pending (but have not yet been argued) in the Second, Third, Fifth, and Ninth Circuits.

muddying previously clear waters, has provoked a spate of compensation disputes. We therefore believe that the question presented in this case ultimately will require resolution by this Court. Unless the Court believes it advisable to wait until other courts of appeals have addressed the problem, this would be an appropriate case in which to put the uncertainty to rest.

CONCLUSION

We do not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted.

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